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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Dwight P. Morejohn

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Law Office of Alan W. Cannon
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EXAMINER

MAI, HAO D

ART UNIT

PAPER NUMBER

3732

MAIL DATE

DELIVERY MODE

07/06/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/748,733	Applicant(s) MOREJOHN ET AL.	
	Examiner HAO D. MAI	Art Unit 3732	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 April 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,2,11,13-30 and 44-52 is/are pending in the application.
- 4a) Of the above claim(s) 2,16-19,27 and 30 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1,11,13-15,20,22-26,28,29 and 44-48 is/are allowed.
- 6) ☒ Claim(s) 49-52 is/are rejected.
- 7) ☒ Claim(s) 21 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 04/29/2010 has been entered.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. **Claims 49-52 are rejected under 35 U.S.C. 102(b) as being anticipated by Nicholas et al. (5,967,974).**

Regarding claim 49, Nicholas et al. disclose an access system (Fig. 3) comprising: a rigid shell 110 having an upper portion 118 and a lower portion 114 and two side portions 110 connecting to said upper and lower portions to define a confined space through which a substernal cavity can be accessed. The system further comprises a lower spreader portion 112 fixed relative to said lower portion 114; and an upper spreader portion 126 connected to said upper portion 118 and positioned relative to said lower spreader portion 112, capable of opening the upper abdominal incision and produce the substernal space for access to the heart. **As to claims 50-52**, the upper spreader portion 126 is shown as capable of lifting the sternal area and

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comprising a hook 132 mounted to a retraction mechanism (rack and pin slider 134/128); the lower spreader portion has a depressor 112 integrally molded with said lower portion 114 capable of engaging the diaphragm and abdominal organs to depress the abdomen at the incision.

Election/Restrictions

4. Claims 1, 11, 13-15, 20, 22, and 44-48 are allowable. Claims 2, 16-19, 21, and 23-30, have been withdrawn from consideration as to species non-elected with traverse in the Response to Restriction Requirement filed on 11/07/2005. It is noted that Applicant elected Species II which is directed to the embodiment of Figure 2 in said Response.

5. The restriction requirement between Species I—XVIII, drawn to various embodiments shown in Figures 1-20, as set forth in the Office action mailed on 10/04/2005, is hereby reconsidered in view of the allowability of claims to the elected invention pursuant to MPEP § 821.04(a). And restriction requirement is hereby withdrawn as to any claim that requires all the limitations of an allowable claim as follows. Furthermore, Applicant is hereby entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. Considerations of the withdrawn claims are as follows.

6. **Allowable independent claim 1 recites features disclosed only in the embodiment of Figure 2 and therefore is not generic to any other disclosed embodiments/species.**

- Claim 2 is drawn to feature(s) disclosed in the embodiments/species of Figures 14-16. Claim 2 remains withdrawn from consideration because the embodiments of Figures 14-16 do not include all the limitations of the allowable independent claim 1. Applicant is required to cancel claim 2.

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7. Allowable independent claim 11 recites features disclosed in the embodiments of Figures 2, 11, and 16; and therefore may be generic to respective withdrawn dependent claims that recite feature(s) disclosed in said embodiments of Figures 2, 11, and/or 16.

- Claims 16-18 are drawn to features shown in the embodiments of Figures 14-16. However, claims 16-18 are dependent on claim 14, which is drawn to feature(s) disclosed in the embodiment of Figure 2 only. Therefore, claims 16-18 remain withdrawn from consideration because the embodiments of Figures 14-16 do not include all limitations of the allowable base claim 11 *and* intervening claim 14.
- Claim 19, which is drawn to feature(s) disclosed in the embodiment of Figures 6A-6B, remains withdrawn from consideration because the embodiment of Figs 6A-6B do not include all the limitations of the allowable base claim.
- Claims 21 and 23-25 are drawn to feature(s) of obvious variants of the retraction mechanism recited in allowable base claim 11 and intervening claim 20. Therefore, claim 21-25 are no longer withdrawn from consideration and are allowable as including all limitations of the allowable base claim 11 and intervening claim 20.
- Claim 26, drawn to feature(s) disclosed in the embodiment of Figure 11, is no longer withdrawn from consideration and is allowable as including all limitations of the allowable base claim.
- Claim 27, drawn to feature(s) disclosed in the embodiments of Figures 12 and 15, remains withdrawn from consideration because the embodiments of Figures 12 and 15 do not include all the limitations of the allowable base claim.
- Claim 28 drawn to feature(s) of obvious variant of or combinable to the base claim, is no longer withdrawn from consideration and is allowable as including all limitations of the allowable base claim.
- Claim 29, drawn to feature(s) disclosed in the embodiments of Figures 14-16, is no longer withdrawn from consideration and is allowable as including all limitations of the allowable base claim 11

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- Claim 30, which is drawn to feature(s) disclosed in the embodiments of Figures 14-15, remains withdrawn from consideration because the embodiment of Figures 14-15 do not include all the limitations of the allowable base claim.

8. In summary, **claims 21, 23-26, and 28-29**, are no longer withdrawn from consideration and are allowable as including all limitations of the allowable base claim and intervening claim(s). **Claims 2, 16-19, 27, and 30** remain withdrawn from consideration because they are directed to features not required by or combinable with all the limitations in the allowable base and intervening claim(s). **Applicant is required to cancel claims 2, 16-19, 27, and 30.**

9. In view of the above noted withdrawal of the restriction requirement, applicant is advised that if any claim presented in a continuation or divisional application is anticipated by, or includes all the limitations of, a claim that is allowable in the present application, such claim may be subject to provisional statutory and/or nonstatutory double patenting rejections over the claims of the instant application. Once a restriction requirement is withdrawn, the provisions of 35 U.S.C. 121 are no longer applicable. See *In re Ziegler*, 443 F.2d 1211, 1215, 170 USPQ 129, 131-32 (CCPA 1971). See also MPEP § 804.01.

Claim Objections

10. Claim 21 is objected to because of the following informality: claim 21 is dependent on itself, which is assumed to be a typographical error and should be corrected to be dependent from claim 20. Appropriate correction is required.

Allowable Subject Matter

11. Claims 1, 11, 13-15, 20, 22-26, 28-29, and 44-48 are allowed. Note that claim 21 would be allowable if corrected to overcome the objection of the typographical error as noted above (assuming that claim 21 is dependent on claim 20).

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Response to Arguments

12. Applicant's arguments regarding the newly made amendments to the claims have been considered; the newly made amendment have overcome the cited prior art. New claims 49-52 are rejected as detailed above. Also see considerations of withdrawn claims depending from allowable base claims as detailed above.

Conclusion

13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to HAO D. MAI whose telephone number is (571)270-3002. The examiner can normally be reached on Monday-Friday. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Cris Rodriguez can be reached on (571) 272-4964. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

14. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

**/Hao D Mai/
Examiner, Art Unit 3732**

**/Cris L. Rodriguez/
Supervisory Patent Examiner, Art Unit 3732**

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